OUTER HOUSE, COURT OF SESSION

[2017] CSOH 149

P1159/17

OPINION OF LADY CLARK OF CALTON

In the petition

INFORMA UK LIMITED

Petitioner

against

FRASER McDOUGALL

Respondent

for interdict and interdict *ad interim* against the Respondent

Petitioner: O'Neill QC; Dentons UKMEA LLP
Respondent: Mure QC; Harper Macleod LLP

5 December 2017

Summary

[1] Informa UK Limited, (the petitioner), was until October 2017 the employer of Fraser McDougall, (the respondent), and raised a petition for interdict and interdict *ad interim* against the respondent founded on a restrictive term and condition in his contract of employment as varied. As a caveat was lodged on behalf of the respondent, the matter came before the court as a disputed motion on behalf of the petitioner for *interim* interdict.

[2] There was before the court another petition in almost identical terms in respect of a former employee of the petitioner, namely Allister Phillips and for convenience the

petitioner's motions for *interim* interdict in both petitions were heard at the same time. Mr O'Neill QC represented the petitioner in both petitions and Mr Mure QC represented the two respondents, Fraser McDougall and Allister Phillips. Neither counsel submitted that there were any differences of any significance in respect of the motion for *interim* interdict in the two separate petitions.

[3] In this Opinion, I deal with the issues raised by counsel in the petition against Fraser McDougall.

The Factual Averments in the Petition

[4] The facts averred in the petition were supplemented in oral submission by counsel for the petitioner under reference to a detailed note of argument. In summary, the petitioner is a member of the Informa Plc group of companies and is involved in a multimillion pound business organising large scale events and exhibitions, providing professional training and specialist business intelligence to a wide range of customers and subscribers. Informa Plc is listed on the London Stock Exchange and is a constituent company of the FTSE 100 index. In 2013 under a share purchase agreement, a business called Phillips McDougall (a partnership) had been bought by the petitioner at substantial cost and the partners Matthew Phillips and John McDougall transferred all their shares at an agreed purchase price. Existing staff of the partnership were transferred to the employment of the petitioner. The staff included Allister Phillips and Fraser McDougall who were the sons of the founders of the partnership Phillips McDougall. They were promoted in December 2015 and at that time both signed what the petitioner called "the standard BI anti-compete clause" which was added to their existing terms and conditions of employment. On 10 April 2017 Fraser

McDougall and Allister Phillips sent separate letters of formal notice of resignation (6/3 of process) which stated:

> "... As per the terms of my employment contract, I will continue to work for the company for the next six month period, completing my employment on 10th October 2017.
>
> For the sake of good form and business courtesy I wish to inform you that I will be joining a competitor company and have been instructed by that company not to divulge their identity at this time. In due course my new employer will be informing all the various companies active in the agrochemical, seed and financial services industries. I am sure you that you will respect their wishes during our formal notice period."

The petitioner became aware that Fraser McDougall and Allister Phillips had resigned "to take up positions with Phil Mac Associates, trading as AgBioInvestor" and averred that Phil Mac Associates is a partnership formed under Scots law. There was legal correspondence with solicitors acting for Allister Phillips and Fraser McDougall in which solicitors for the petitioner drew attention to the terms described as restrictive covenants in the employment contracts. Thereafter solicitors for the petitioner were advised that Fraser McDougall and Allister Phillips had been assumed as partners of Phil Mac Associates and were not employed by the partnership. It became apparent to the parties that there was a live dispute as to whether being partners actively engaged in the partnership business trading as AgBioInvestor breached any aspect of the restrictive covenants.

[5] Shortly before the commencement of the hearing before this court, counsel for the petitioner was given a copy of the Phil Mac Partnership Agreement (7/1 of process). This document identified Fraser McDougall and Allister Phillips as the first elected senior partners. Counsel drew attention in particular to Clauses 2.1 and 19 which bound the partners from 1 June 2017 to:

> "Devote his whole time and attention to the business of the firm, use his best skill and endeavours to carry on the same for the utmost benefit of the firm, diligently

> and faithfully employ himself therein and no partner shall without the prior consent of the other partners be engaged or concerned or interested in any way whatsoever in any other profession or business or hold any office or appointment;"

Counsel submitted that this agreement was made at a time when both Fraser McDougall and Allister Phillips were still in employment with the petitioner. In the Partnership Agreement the original date for commencing trading was 10 October 2017. Thereafter it appeared from a document dated 24 July 2017 that a vote was held and in order to avoid confusion "over the final day of employment at Informa" it was agreed to change the date of commercialisation to 11 October 2017.

[6] I did not understand from the respondent's counsel that the history of employment or the terms of the employment contract were disputed in any significant way for the purposes of the hearing. I understood from his submissions, however, that there were disputes about the extent to which Fraser McDougall and Allister Phillips were involved and privy to parts of the business of the petitioner in particular the extent of their involvement after notice of resignation was given on 10 April 2017. Counsel submitted that thereafter their involvement was very limited and circumscribed by the petitioners. He described this as "gardening leave".

Contractual Terms and Conditions

[7] The original contract of employment of Fraser McDougall and Allister Phillips contained in Clause 13 a non-disclosure clause relating to secret or confidential information. As part of the agreement about their promotion while in employment by the petitioner, the original period of notice was increased to 6 months and they were required to agree to the standard BI "anti-compete clause". They did so agree and the terms and conditions of employment were varied. The "anti-compete clause" stated:

"1. **Obligations following termination.** For the purposes of this clause "the Company" includes any subsidiary or associated company. The Employee agrees that for a period of six months following employment with the Company they will not – whether on their own behalf or in conjunction with or on behalf of any person, company, business entity or other organisation and whether as an employee, director, principal, agent, consultant or in any other capacity directly or indirectly:

1.1 (a) solicit, or (b) assist in soliciting, or (c) accept, or (d) facilitate acceptance of, or (e) deal with, in competition with the Company, any customer of the Company with whom the Employee had personal contact or dealings on behalf of the Company during the 6 months immediately preceding termination of employment.

The purpose of this post-termination clause 1.1 is to protect the legitimate commercial interest of the Company. The Company will give responsible consideration to a written request from an ex-employee to vary this obligation where the ex-employee believes it unreasonably restricts his or her opportunity to pursue their normal profession or occupation.

1.2 (a) induce, or (b) solicit, or (c) entice, or (d) procure, any person who is a company employee (other than secretarial, clerical or junior employees) to leave the Company's employment where that person was employed by the Company at the date of termination of the employee's own employment.

1.3 (a) induce, or (b) solicit, or (c) entice, or (d) procure, any person or business with whom the employee had personally dealt during the twelve months prior to termination, and who provided professional advice or services to the Company. Non-exhaustive examples include authorise, speakers, trainers, producers and journalists.

1.4 Be employed by any direct competitor, or any subsidiary of a direct competitor. The purpose of this post-termination clause 1.4 is to protect the legitimate commercial interests of the Company. The Company will give responsible consideration to a written request from an ex-employee to vary this obligation where the ex-employee believes it unreasonably restricts his or her opportunity to pursue their normal profession or occupation. For the purpose of this sub-clause 1.4 only, direct competitor is any organisation listed in the Financial Times Stock Exchange Index in the same category as Informa plc, and/or any other business providing materially similar products and services to those on which the Employee worked in the twelve months prior to termination."

Legal Submissions by Counsel

[8] In his written note of argument and oral submissions, counsel set out the proper approach to the principles to be applied. He prayed in aid the summary by Lord Brodie in *Sundolitt Ltd* v *Addison* [2017] CSIH 15 at paragraph 23. Counsel accepted that there was a dispute about the interpretation of the clause on which he sought to rely, namely Clause 1.4. He submitted the clause must be interpreted in its full context which includes the words of Clause 1. The word "employed" is capable of a number of meanings depending on the circumstances and context under reference to *William Hill Organisation Ltd* v *Tucker* 1998 ICR 291, Morrit LJ at 297. It is plainly envisaged in Clause 1.4 that there is a breadth of various offices which are prohibited and the verb "employed" has to be interpreted in the general sense of "engaged". This has two advantages. To interpret the word "employed" in this context as meaning "employed under a contract of employment" would make a nonsense of the intended breadth of the clause and make some of the wording redundant. To read the wording in its full context as "engaged" gives a business sense to the agreement to which the parties signed up. Secondly, by adopting this approach, counsel submitted that the court need not therefore enter into a conceptual legal mine field as to whether or not a partner may enter into a contract of employment with his or her own partnership. Having canvassed some of the English law authorities, he submitted under reference to *Alison* v *Alison's Trustees* (1904) 6F 496 and *Fife County Council* v *Minister of National Insurance* 1947 SC 629 that this remained an arguable question under Scots Law. Counsel further submitted, under reference to *Sundolitt Ltd* v *Addison*, that courts in Scotland will uphold post-termination employment restrictions if the obligation, as in this case, can be said to be reasonably necessary to protect the former employer's legitimate interests. Plainly this was such a case. The non-compete clause was of short duration for a period of 6 months and the

period of any *interim* interdict would be even shorter as the 6 month period ran from the date of resignation.

[9] The main submission of counsel for the respondent was that the meaning of "be employed by" has a clear and actual meaning and the words mean what they say. It is not permissible to construe words or phrases contrary to their natural meaning. *Tillman (appellant)* v *Egon Zehnder Ltd* [2017] EWCA Civ 1054 paragraph 20. There are no averments that the respondent is employed by the partnership firm. From the nature of the business of the petitioner, one might understand why an employee moving to an established competitor might give concern to the petitioner. But a proper reading of Clause 1.4 does not prevent the respondent as an individual starting a new business. Reference is made to *WAC Ltd* v *Whillock* 1989 SC 397 Lord Ross at 409. Lord Ross emphasised that a clear distinction falls to be drawn between an individual carrying on business and a company carrying on business. A similar distinction is recognised in *Taylor* v *Campbell* 1926 SLT 260.

[10] Counsel also drew attention to the lack of specification in the petition about the need for protection of the petitioner's legitimate business interests. The respondent was not involved in certain work specified such as training services. Counsel also submitted that the way in which the petitioner had dealt with the respondent in relation to "gardening leave" had given the petitioner the benefit of the 6 months protection envisaged in the restrictive covenant. There had been a prior breach by the petitioner of the mutual obligations as between employer and employee.

Decision and Reasons

[11] I did not understand that there was any dispute between the parties about the general principles to be applied in considering whether the court should give effect by

interdict *ad interim* to a restrictive covenant. The court requires to be satisfied that there is a *prima facie* case set out by the petitioner and if so that the balance of convenience favours the grant of *interim* interdict. I am content to proceed as described by Lord Brodie in *Sundolitt Ltd* in paragraphs 22 and 23 in relation to a consideration of whether the petitioner has made a *prima facie* case for *interim* interdict in terms of the prayer of the petition founding upon Clause 1.4 of the employment contract as varied. I note that the petitioner did not seek *interim* interdict in respect of any of the other clauses of the contract.

[12] At this early stage of proceedings, I am not disposed to analyse too closely or severely the petitioner's pleadings particularly in circumstances in which counsel for the petitioner received important documentation such as the Partnership Agreement (7/1 of process) on the date of the hearing and further information was made available to him by email during the course of his submissions. I accept that from the perspective of both parties there may be a dispute as to whether there was a breach of mutual obligations. I am not in a position to resolve that and in any event such issues are unfocussed at present.

[13] The important issue which I consider at this stage bears upon whether the petitioner has a *prima facie* case is the interpretation and meaning of Clause 1.4. I would accept at this stage that there appears to be legitimate business interests for the petitioner to protect and that, even if the Clause has the wider meaning contended for by the petitioner, the restrictions are reasonably necessary for the protection of the petitioner's interests. The submissions about interpretation made by counsel for the petitioner are certainly arguable for the reasons he gave but I do not agree with counsel that the petitioner's case is a strong case. I note that the obligation in Clause 1.4 is drafted within the context of a contract of employment and the opening words of Clause 1 refer specifically to the employee agreeing to certain matters following employment. By choosing to use the words "Be employed by"

in Clause 1.4, I consider that there is a strong argument that the words "be employed" or "employed" are words being used with their most obvious meaning, as contended for by counsel for the respondent. In addition whatever Clause 1.4 may mean, it does not appear to prohibit a former employee himself setting up as a sole trader and direct competitor. Although I accept that the opening words in Clause 1 are very wide, these words provide the context for Clauses 1.1 to 1.3 as well as Clause 1.4. The general words give context, for example, to Clause 1.1 and give a very wide meaning to Clause 1.1. That is to the advantage of the petitioner and, in relation to the non-solicitation restriction, understandable. It may be however that a former employee setting up business in direct competition as a sole trader or as a partner was not a potential harm contemplated by a company operating internationally with a multimillion pound business. I accept that the meaning is more restricted if "employed" is interpreted as "employed under a contract of complyment" but there are still protections for the petitioner.

[14] As I understand counsel for the petitioner's submission, he contends that even if he is wrong in relation to the wide interpretation which should be given to the words "Be employed" he has a *prima facie* case on an esto basis albeit he accepted that there are uncertainties about Scots law and the employment status of partners. I am not required to come to any definitive decision about this and I merely observe that I do not think this fall-back position strengthens the petitioner's case. I say that notwithstanding the use of the words "faithfully employ himself therein" in Clause 19.2 of the Partnership Agreement (7/1 of process) on which counsel for the petitioner relied.

[15] In considering the balance of convenience, I take into account that the petitioner has the protection of Clauses 1.1 to 1.3 which are not in dispute. I do not regard these obligations as necessarily difficult to monitor and enforce. I consider in particular that

Clause 1.1 provides some significant protection to the petitioner. I note also that undertakings in respect of Clauses 1.1 to 1.3 have been offered to the petitioner. The problem identified by the petitioner is that Clauses 1.1 to 1.3 are said not to protect the petitioner because it will be impossible to establish whether or not information etc has been used by the respondent in the new partnership. I was given very little further information about this perceived problem. I consider that it may be more of a problem in a situation where the former employee has transferred to a competitor with a well-established business. But in this case the active partnership business commenced at or about the same time as any obligation created in Clause 1.4. If there is a breach of Clause 1.4, the identification and the effects of that would be considered in the context of a new business. In any event if *interim* interdict was granted and was not well founded, I consider that it would be difficult to identify for the purposes of a calculation of damages the effect of *interim* interdict on the respondent.

[16] Taking into account what I consider to be weaknesses in the petitioner's position in relation to the disputed interpretation of Clause 1.4 which is the foundation of the petitioner's case and trying to weigh up, as best I can, the balance of convenience I am not persuaded to exercise my discretion in favour of the petitioner. For these reasons therefore I refuse the petitioner's motion for *interim* interdict.